

OCT 18 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TOMAS YEPEZ-TELLO,

Defendant - Appellant.

No. 05-10079

D.C. No. CR-04-00135-KJD

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Nevada
Kent J. Dawson, District Judge, Presiding

Submitted October 11, 2005^{**}

Before: NELSON, T.G., WARDLAW, and TALLMAN, Circuit Judges.

Tomas Yepez-Tello appeals the 57-month sentence imposed following his guilty plea conviction for illegal reentry following deportation, in violation of

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

8 U.S.C. § 1326. We have jurisdiction pursuant to 18 U.S.C. § 3742(a), and we affirm.

Tomas Yepez-Tello, who was sentenced under advisory guidelines in the wake of *United States v. Booker*, 125 S. Ct. 738 (2005), contends that his sentence was imposed in violation of the Sixth Amendment because it was enhanced above the two-year maximum term of imprisonment provided under § 1326(a) on the basis of a prior crime of violence neither alleged in the indictment nor proved beyond a reasonable doubt. This contention is foreclosed by *United States v. Moreno-Hernandez*, 419 F.3d 906, 914 n.8 (9th Cir. 2005) (“*Booker* bars the district court from considering only those facts not found by the jury *other than* the fact of prior conviction”). Moreover, the district court’s determination, that Yepez-Tello’s prior California conviction for copulation with a child under the age of 14 is a crime of violence, does not implicate the Sixth Amendment. *United States v. Von Brown*, 417 F.3d 1077, 1079-80 (9th Cir. 2005) (stating that the district court made no impermissible finding of fact because whether a prior felony is a crime of violence “is a legal question, not a factual question coming within the purview of *Apprendi*, *Blakely*, and *Booker*”).

AFFIRMED.